STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Judge Regina M. Chu

Lawrence S. Plack,

Plaintiff,

v.

City of Greenfield, a Minnesota incorporated city, Jill Krout, individually, and Unnamed Party A,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND MEMORANDUM

File No. 27-CV-09-4031

The above-entitled matter came duly on for a hearing before the Honorable Regina M. Chu, Judge of District Court, on August 20, 2009, upon Defendant City of Greenfield and Jill Krout's motion for summary judgment and Plaintiff Lawrence Plack's motion for continuance pursuant to rule 56.06. Gregory Abbott, Esq., appeared on behalf of Plaintiff. Pamela Vanderweil, Esq., appeared on behalf of Defendants. Based upon the argument of counsel, and all of the files, records and proceedings herein, the Court being duly advised,

IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment is **GRANTED**.
2. Plaintiff's motion for continuance is **DENIED.**
3. This matter is **DISMISSED WITH PREJUDICE.**
4. The attached memorandum is incorporated into this order.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Dated: October 12, 2009

Regina M. Chu
Judge of District Court

MEMORANDUM

I. FACTS

Plaintiff Lawrence Plack is the former mayor of the Defendant City of Greenfield, Minnesota, a public incorporated municipality located in Hennepin County. Plaintiff served as mayor from January 2005 through December 2006, when he was defeated in his re-election bid by the current mayor, Defendant Jill Krout. During Plaintiff's term as mayor, Krout was a frequent critic of the mayor's tax and spending policies. In early 2006, Krout began attending City Council meetings where she expressed opposition to the 28% increase in the City's annual budget. Krout also objected to Plaintiff's decision to install tornado sirens and purchase a new city hall building. Krout ultimately decided to run against Plaintiff in the 2006 mayoral election.

In the November 2006 election, Krout received 87% of the vote and was elected Mayor of Greenfield. Upon becoming mayor, Krout suggested that Greenfield consider adopting a city charter that would require expenditures over a certain threshold be approved by voters. Krout also discussed incorporating some type of recall provision into the charter that would allow voters to remove a sitting City Council member. During a June 2007 City Council meeting, the Council voted to request that the Chief Judge of Hennepin County District Court establish a Charter Commission to develop the city charter.[1] Consistent with the City Council's request, the Chief Judge established a nine-member Charter Commission. Krout was among one of the nine original members appointed to the Commission.

In early 2008, four members of the Charter Commission resigned their positions. In response, the City Council submitted the names of four potential replacements to the Chief Judge. Several members of the public wrote letters to the Chief Judge objecting to the names

---

[1] Under Minnesota law, the Chief Judge was the only official vested with authority to appoint a charter commission. *See* Minn. Stat. § 410.05 subd. 1.

submitted by the City Council. Based upon these objections, the Chief Judge notified the City Council by letter dated April 28, 2008, that she would delegate selection of the Commission members to the City Council.

As the process of filling the four vacant seats progressed, the five remaining members of the Charter Commission completed a proposed city charter. On May 5, 2008, the five-member Commission voted to approve their draft charter and submit it to the City for approval. The following day, the Commission delivered the proposed charter to the City. Because Minnesota law requires that a Charter Commission have at least seven members, the Greenfield City Attorney would not accept the proposed charter. At that evening's City Council meeting, the council voted 3-2 to adopt a resolution to increase the size of the Charter Commission to 15 members. Mayor Krout voted against the resolution. The City Council then voted to forward ten names to the Chief Judge for appointment. Plaintiff was among the names forwarded by the council. Three days later, the Chief Judge appointed the ten individuals suggested by the City Council.

The first Commission meeting following the appointment of the ten new members occurred on May 12, 2009. According to Plaintiff, the Commission's chair, Roger Mattila, refused to acknowledge the new members at the May 12 meeting. During the brief meeting, Mattila allegedly told the other Commission members that the Commission's work was complete and that a proposed charter had already been sent to the City.

The next Charter Commission meeting was scheduled to occur on May 19, 2009. On the morning of May 19, Roger Mattila sent an email to City Hall indicating that the Charter Commission meeting scheduled for that evening was cancelled. After being notified of the cancellation by the City Administrator, Plaintiff telephoned the other nine recently-appointed

commission members to inquire into whether they wished to still hold the meeting. Plaintiff then emailed the City Administrator informing him that the meeting would be held that evening. Plaintiff did not, however, inform the original five members of the Commission. The meeting convened at 7:00 p.m. with only the ten new members in attendance. At the meeting, the Commission elected Plaintiff the new chairperson and voted to recall the charter that had previously been submitted to the City.

Over the course of the next several months, Mayor Krout became dissatisfied with the progress of the Charter Commission. Krout believed that the Commission was not meeting often enough, and that Plaintiff was impeding progress towards establishing a charter. During a number of Charter Commission and City Council meetings, Krout expressed her views concerning Plaintiff's past performance as mayor and his current performance as Charter Commission Chairperson. She also raised questions regarding whether Plaintiff had the judgment or ethics to serve on the Commission.

For example, during a commission meeting in October 2007, Krout stated that Plaintiff had failed to appropriately budget for the annual National Night Out event. Krout also said that Plaintiff had purchased "an unsuitable building" as mayor and that he "didn't adjust [taxes] one dollar after he gave the impression that he would." (Plack Aff. ¶ 10.) Other Commission members also made negative statements regarding Plaintiff's performance as mayor. On February 3, 2009, Mayor Krout attended a City Council meeting at which she said that: (1) Plaintiff had not called a Charter Commission in five months; (2) the Minnesota Private Detective and Protective Agent Services Board had recently denied Plaintiff's private detective license application after finding that Plaintiff had failed to show good character; (3) Plaintiff's

home was in foreclosure; and (4) there was a $125,000 federal tax lien on Plaintiff's residence. Mayor Krout went on to say that:

> [Plaintiff] opposes the charter. He hasn't moved forward. He's got some personal issues that were brought out that make him not a good representative of the city, and um, there have been some open meeting violations . . . [Plaintiff] is one of the least fit persons to be leading [the Charter Commission]. If he opposes [the charter], it's like saying I want to be in the Socialists Party but hey I'm really a libertarian, it wouldn't work too well.

(Plack Aff. ¶ 18.) Mayor Krout then moved the City Council to send a letter to the Chief Judge requesting that Plaintiff be removed from his position on the Charter Commission. The Council voted to send the letter, which was dated February 5, 2009. The letter "strongly urge[d]" the Chief Judge to remove Plaintiff from the Commission in part because Plaintiff's "excesses and abuses while Mayor inspired the creation of a charter to prevent similar behavior by future elected officials." (Krout Aff. Ex. F.) The letter outlined a number of concerns the council had regarding Plaintiff, including a criminal conviction for driving while intoxicated and a $425,000 civil settlement paid by the City related in part to Plaintiff's conduct while mayor. The Council concluded its letter by asking that the Chief Judge "remove [Plaintiff] from the Charter Commission so that the Commission can fulfill its intended purpose." (*Id.*)

On February 17, 2009, Plaintiff filed suit against the City of Greenfield and Mayor Krout[2] alleging defamation, harassment, data practices violations, intentional and negligent infliction of emotional distress, "malfeasance," civil rights violations, "violation of oath of office," and "punitive damages." (Compl. ¶¶ 62-126.) In the course of discovery, Defendants invoked the protections of Minnesota's anti-SLAPP statute and now move for summary judgment.

---

[2] Plaintiff also named Charter Commission member Bruce Rawlings and the Farmers State Bank of Hamel as defendants. Plaintiff has since dismissed his claims against these defendants.

II. ANALYSIS

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. A court should grant summary judgment "if, based on the entire record, no issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 215 (Minn. 1985). The existence of a genuine fact issue "must be established by substantial evidence", which means "evidence sufficient to avoid a directed verdict at trial." *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). The moving party has the burden of proof and the nonmoving party has the benefit that the evidence will be viewed in a light most favorable to him. *Ahlm v. Rooney*, 143 N.W.2d 65, 68 (Minn. 1966).

Plaintiff asserts a host of claims against Defendants, many of which relate to allegedly defamatory statements made by Mayor Krout at city meetings. Defendants raise a number of arguments in support of their motion for summary judgment, including absolute and qualified immunity. These claims and defenses raise complex and important issues of law. For purposes of clarity, the Court will individually analyze each cause of action to determine whether summary judgment is warranted.

A. Defamation

Plaintiff asserts defamation claims against Mayor Krout based upon statements she made at city meetings and in the letter to the Chief Judge. Although the complaint fails to precisely identify the allegedly defamatory statements, Plaintiff has since filed an affidavit in which he

specifically quotes statements made by Mayor Krout that he claims are defamatory.[3] All of the statements identified by Plaintiff were made during city meetings or in the February 2009 letter to the Chief Judge.[4] Defendants raise three arguments in response to this claim. First, Defendants assert that Mayor Krout is protected by the doctrine of absolute immunity. Second, Defendants argue that the alleged statements are either substantially true or not capable of a defamatory construction. Third, Defendants contend that this claim must be dismissed under Minnesota's Anti-SLAPP statute.

I. Absolute Immunity

Defendants argue that many of the allegedly defamatory statements made by Mayor Krout are protected by absolute immunity. Under the doctrine of absolute immunity, a speaker is shielded from liability arising out of any statements made during the course of a judicial or quasi-judicial proceeding. *Cole v. Star Tribune*, 581 N.W.2d 364, 369 (Minn. App. 1998). To be protected, a statement generally must: (1) have been made by a judge, judicial officer, attorney, or witness; (2) at a judicial or quasi-judicial proceeding; and (3) the statement at issue must be relevant to the subject matter of the litigation. *Mahoney & Hagberg v. Newhard*, 729 N.W.2d 302, 306 (Minn. 2007). Absolute immunity also "extends to statements published prior to the judicial proceeding, but in order for the privilege to apply, such statements must have some relation to the judicial [or quasi-judicial] proceeding." *Id.* (citing *Matthis v. Kennedy*, 67 N.W.2d 413, 419 (Minn. 1954)).

---

[3] When specifically asked to identify what statements were defamatory, Plaintiff's counsel directed the Court to the Affidavit of Lawrence S. Plack dated August 7, 2009. Beyond this affidavit and vague allegations in the complaint, Plaintiff has not indicated any other statements that he claims are defamatory.

[4] The complaint also references statements made on KSTP radio on February 3, 2009. Beyond this vague reference, Plaintiff provides no further information regarding the content of these alleged statements. Plaintiff has failed to produce any evidence regarding this claim, and he asserts no argument in support of this allegation. Thus, this allegation cannot survive summary judgment and will not be analyzed as part of this motion.

A quasi-judicial proceeding is any process by which a governmental body or officer exercises "deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of discretionary power." *Cole*, 581 N.W.2d at 369. Examples of quasi-judicial proceedings include meetings of a city planning commission involving the designation of historic buildings, *Handicraft Block Ltd. v. City of Minneapolis*, 611 N.W.2d 16 (Minn. 2000), meetings of the State Board of Pardons, *Cole*, 581 N.W.2d at 364, and meetings of a state chiropractic board, *State Board of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959 (Colo. 1997). The privilege is:

> based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. To accomplish this, it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action. To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position.

Bol v. Cole, 561 N.W.2d 143, 148 (Minn. 1997) (quoting Restatement (Second) of Torts § 584 (1977)).

Defendants argue that any statements made in the February 5, 2009 letter to the Chief Judge were made during or in preparation for a quasi-judicial proceeding and thus are protected by absolute privilege. To evaluate this argument, it is necessary to examine the circumstances and procedures surrounding the request to remove Plaintiff from the Charter Commission.

Minnesota Statute section 410.05 subdivision 1 provides that the district court may appoint a charter commission when it "deems it for the best interest of the city so to do." Section 410.05 subdivision 2 states that "[a]ny member may be removed at any time from office, by written order of the district court, the reason for such removal being stated in the order." Section

410.05 accordingly confers discretion upon the Chief Judge to consider the relevant facts and determine the best composition of a charter commission. When considering the City Council's request to remove Plaintiff from the Charter Commission, the Chief Judge was exercising "deliberate human judgment based upon evidentiary facts of some sort" to determine whether to remove a member from the Commission. *See Cole*, 581 N.W.2d at 369.

By sending the letter to the Chief Judge, Mayor Krout and the City Council were providing information to aid the Chief Judge in exercising quasi-judicial duties. The policy behind the absolute privilege – ensuring that those having information relevant to the decision-making process are free to speak without fear of civil suits – is implicated. The content of the letter was relevant to the matter before the Chief Judge; namely, the appropriate composition of the Charter Commission and whether to remove Plaintiff. Therefore, any statements made in the letter are protected by absolute privilege.

Defendants also argue that statements made at the February 3, 2009 City Council meeting are protected by absolute privileged. It is well established that "[a]bsolute privilege extends to statements published prior to the judicial proceeding [so long as the statements] have some relation to the judicial proceeding." *See Mahoney*, 729 N.W.2d at 306. Thus, any statements made by Mayor Krout concerning whether to send a letter or the content of the letter are protected by absolute privilege.

Plaintiff identifies the following statements made by Krout at the February 3, 2009 City Council meeting as defamatory: (1) Plaintiff "has gone on record many times opposing the charter;" (2) Plaintiff was elected at a meeting that violated the Data Practices Act; (3) Plaintiff "hasn't moved [the charter] forward – He's got some personal issues that were brought out that make him not a good representative of the city . . . maybe we could update the judge on the

history;" (4) "I think [Plaintiff's] kind of intimidating, not for me or us, but he intimidates other people;" (5) Plaintiff packs a gun and is an "embarrassment" to the city; (6) only 12% of the city residents voted for Plaintiff and "to put something back in his hands is pure foolishness;" and (7) the "council should weigh in and say we think leadership is not fit and that person should be removed." (Plack Aff. ¶ 18.) These statements relate directly to the February 3 letter to the Chief Judge. The statements communicate why Krout felt the City should send a request to the Chief Judge, as well as the appropriate content of the request. These statements "have some relation to the judicial proceeding," and thus are protected by the doctrine of absolute immunity. Defendants' motion for summary judgment is granted as to any defamation claims arising out of the February 3, 2009 City Council meeting or the February 5, 2009 letter to the Chief Judge.

II. Defamatory Construction & Truth of Statements

Even if not protected by absolute immunity, Defendants argue that Mayor Krout's statements are either substantially true or not capable of a defamatory construction. To establish a claim for defamation, a plaintiff must show that: (1) the defamatory statement was communicated to some third party; (2) the statement was false; and (3) the statement tends to harm the plaintiff's reputation and lower the plaintiff in the estimation of the community. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919-20 (Minn. 2009). Only statements "that present or imply the existence of fact that can be proven true or false are actionable under state defamation law." *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org.*, 694 N.W.2d 92, 95 (Minn. App. 2005). Statements that merely express "a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts" are not actionable. *Id.* at 96 (citing *Haynes v. Alfred A. Knopf, Inc.*, 8F.3d 1222, 1227 (7th Cir. 1993)) (internal quotations omitted). Additionally, "true statements,

however disparaging, are not actionable." *Poncin v. Arlt*, 428 N.W.2d 485, 487 (Minn. App. 1988) (quoting *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980)).

Plaintiff has identified a long list of statements that he claims are defamatory. The majority of the identified statements express opinion regarding Plaintiff's character or his performance in city positions. For example, Plaintiff identifies the following statements as defamatory: (1) Plaintiff purchased an "unsuitable [city hall] building" when he was mayor; (2) "it's an embarrassment and part of the reason for the embarrassment is Larry Plack;" (3) "[Plaintiff] is totally unfit and he's causing the – and he's well, I guess I can't think of anything good to say, but I think we got a pretty good indication of what a majority of residents think of Larry Plack at the election where he got 12% of the – So I think to put something back in his hands is pure foolishness;" (4) "I think that council should weigh in and say we think leadership is not fit and [Plaintiff] should be removed;" and (5) "[The Charter Commission is] doing things that I think are not appropriate," such as voting by a show of hand, not putting anybody's name on a vote, and allowing votes by proxy. (Plack Aff. ¶ 18.)

These statements plainly constitute Mayor Krout's subjective view of Plaintiff's past performance as mayor and his current ability to hold a public position. Krout's statement that Plaintiff purchased an "unsuitable building" is a purely subjective opinion concerning the quality of a facility purchased by the City of Greenfield. Similarly, Krout's opinion that Plaintiff is unfit to chair the Charter Commission or is an embarrassment to the City is a subjective expression of her views regarding Plaintiff's ability to act as a commission chair. These statements are not verifiable factual assertions that can give rise to defamation claims; they are vague opinion statements that are not actionable. For this reason, the majority of Plaintiff's factual allegations fail to state a claim for defamation.

While most statements fall into the non-verifiable category, there remain a number of identified statements that are verifiable factual assertions. Among this category of statements are: (1) Plaintiff's residence is in foreclosure; (2) Plaintiff has a $124,995 federal tax lien on his residence; (3) Plaintiff was convicted of fourth-degree driving while impaired; (4) Plaintiff had a loaded firearm in his vehicle at the time of his DWI arrest; (5) the City of Greenfield spent approximately $425,000 to settle a civil suit while Plaintiff was mayor; (6) the civil suit included an allegation of civil assault involving Plaintiff; and (7) Plaintiff's private detective license application was denied by the Private Detective and Protective Agent Services Board after Plaintiff failed to demonstrate good character and honesty. Although these facts may harm Plaintiff's reputation, the undisputed evidence demonstrates that they are true or substantially true. Given that these statements are true, they are not actionable under a defamation theory.

III. Libel Claims Against City of Greenfield

Plaintiff also asserts a libel claim against the City of Greenfield. This claim is premised upon the posting of audio recordings of city meetings on the City's website. Plaintiff claims defamatory statements were made at these meetings and that the City is liable for republishing these statements.

The Court has reviewed the allegedly defamatory statements, all of which are similar to the statements previously cited in this order. They are critical of Plaintiff's performance as mayor and question whether he is an appropriate chairperson for the Charter Commission. Like Krout's statements, these statements are either substantially true or incapable of a defamatory construction. Moreover, Plaintiff fails to articulate how the routine posting of public data concerning events taking place at public meetings can give rise to liability for defamation. For these reasons, Plaintiff's claim for libel against the City of Greenfield is dismissed.

IV. Anti-SLAPP Statute

Defendants also raise the protections of Minnesota's Anti-SLAPP statute, Minn. Stat. § 554.03, as a defense. Plaintiff responds by challenging the constitutionally of the statute. Because Plaintiff's defamation claim fails for other reasons, the Court need not consider these arguments. *See Higazy v. Templeton*, 505 F.3d 161, 179 n.19 (2nd Cir. 2007) (stating that "principles of judicial restraint caution use to avoid reaching constitutional questions when they are unnecessary to the disposition of a case").

IV. Disposition of Defamation Claims

After an exhaustive review of the materials submitted by the parties, the Court finds that all causes of action alleging defamation fail as a matter of law. All statements identified by Plaintiff as defamatory are either not capable of a defamatory construction or are substantially true. In addition, the doctrine of absolute immunity protects Defendants from liability for many of the allegedly defamatory statements. For all of these reasons, Defendants' motion for summary judgment is granted as to all claims brought under a defamation theory.

B. 42 U.S.C. § 1983 – Civil Rights Violations

Plaintiff next asserts a cause of action under 42 U.S.C. § 1983, alleging that Defendants violated his "constitutional right to privacy by publication of a matter concerning the private life of plaintiff." (Compl. ¶ 111.) While the complaint appears limited to alleging a violation of Plaintiff's constitutional right to privacy,[5] subsequent court filings allege a claim based upon "retaliation against Plaintiff for exercising his right of free speech in opposition to Defendants'

[5] The "constitutional right to privacy" as it relates to the non-disclosure of information is generally limited to disclosures related to personal matters such as marriage, procreation, contraception, family relationships, child rearing and education. *See, e.g. United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980). While there is some theoretical support for a general constitutional right to have other types of information kept private, Plaintiff fails to cite and the Court was unable to locate any authority for a constitutional prohibition against a government official discussing publically-available information about a member of a city commission.

political plans." (Pl's Mem. Opp'n Summ. J. at 4.) In essence, Plaintiff claims that Mayor Krout's expression of her opinion regarding Plaintiff's fitness to hold a public position amounts to a federal civil rights violation.

Under 42 U.S.C. § 1983, any person who, under color of law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." To establish a civil rights claim under a First Amendment retaliation theory, a plaintiff must show: (1) he engaged in protected activity; (2) a government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. *Naucke v. City of Park Hills,* 284 F.3d 923, 928-29 (8th Cir. 2002) (citing *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001)).

Section 1983 is designed to protect citizens from government officials or others who act under color of law to deprive a citizen of his or her constitutional rights. As such, the statute provides a remedy to those who face official retaliation after exercising their First Amendment rights. Section 1983 is not intended to serve as a mechanism to enable a litigant to chill the protected speech of another. Stated otherwise, a citizen cannot exercise his or her speech rights and then ask the judiciary to silence opponents simply because they disagree or otherwise attempt to refute the citizen's statements. Doing so would severely limit the free flow of speech that is essential to the First Amendment and basic principles of democratic government. *See Bloch v. Ribar*, 156 F.3d 673, 679 (6th Cir. 1998) (noting that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise").

In recognition of these interests, courts have adopted legal principles that confer immunity upon citizens who are petitioning or otherwise advocating for government action. Specifically, the *Noerr-Pennington* doctrine "protects a citizen's First Amendment right to 'petition the Government for redress of grievances' by immunizing individuals from liability for injuries allegedly caused by their petitioning of the government or participating in public processes in order to influence government decisions." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192-93 (Minn. App. 1997) (citing *Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 381 U.S. 657 (1961)). The *Noerr-Pennington* doctrine protects not only private citizens, but also safeguards government officials who may be acting in their official captivity. *Fischer Sand and Aggregate Co. v. City of Lakeville*, 874 F.Supp. 957, 959 (D. Minn. 1994).

In addition to being a former mayor, Plaintiff was the chairperson of the Greenfield Charter Commission. He actively engaged in debate involving political questions facing the city. Mayor Krout had concerns about whether Plaintiff was an appropriate chairperson for the Charter Commission. She expressed these concerns in city meetings and raised questions about Plaintiff's past and current legal problems. The First Amendment does not prohibit Mayor Krout from making these statements or otherwise questioning Plaintiff's fitness to hold public positions; indeed, the First Amendment encourages such speech.

All of Krout's statements, whether made in the letter to the Chief Judge or during the course of city meetings, were aimed at "petitioning of the government or participating in public processes in order to influence government decisions." *See Kellar*, 568 N.W.2d at 192-93 (citing *Eastern R.R. Pres. Conf.*, 381 U.S. at 657. The letter to the Chief Judge was a direct request for certain government action. Similarly, Krout's statements made during city meetings were forms of advocacy aimed at procuring favorable government action. These statements were part of a

debate concerning who should (or should not) serve on the Charter Commission. *Noerr-Pennington* protects Krout's right to vigorously petition the city to adopt her favored policy positions. Even giving Plaintiff the benefit of every reasonable inference, the Court finds that Mayor Krout's conduct falls within the protections of the *Noerr-Pennington* doctrine.[6]

In addition to *Noerr-Pennington*, Defendants raise qualified immunity as a defense to Plaintiff's First Amendment retaliation claim. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is designed to balance "the need to hold public officials accountable when they exercise power irresponsibly [with] the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly." *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009). The "driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)). Thus, courts have repeatedly stressed "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

The United States Supreme Court has articulated a two-part test for determining whether a government official's conduct is protected by qualified immunity. Under this test, qualified immunity protects a government official unless: (1) the facts alleged or shown by the plaintiff

[6] Plaintiff appears to assert that the City's decision to retain counsel and investigate Plaintiff's lawsuit is retaliation aimed at chilling his protected speech. Plaintiff asks, "[W]hat ordinary citizen would fight City Hall, knowing that City Hall would hire lawyers to dig up everything bad they [sic] ever did, and file that information in open court?" This argument is without merit. Like any ordinary litigant, a government entity has the right to respond to a lawsuit and file information that is relevant to a case. Truth is an absolute defense to a defamation claim. The materials submitted by Defendants showed that certain allegedly defamatory statements made by Mayor Krout were truthful.

would violate one or more of plaintiff's constitutional rights; and (2) the rights at issue were "clearly established" at the time of the defendant's alleged misconduct. *Pearson*, 129 S.Ct. at 815-16. A government official violates a "clearly established" right when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Even assuming all of Plaintiff's factual allegations are true, the complaint and subsequent court filings fail to demonstrate a violation of any constitutional rights. The allegedly defamatory or otherwise negative statements made by Mayor Krout amounted to protected political discourse related to issues of city business. There has been no showing that a reasonable person would be prevented from exercising his right to participate in the political process due to Krout's statements. Thus, Plaintiff has failed to allege or show any actionable civil rights violations. Even if Plaintiff could show a civil rights violation, he has failed to articulate how the alleged conduct violates a clearly established constitutional right. Therefore, Mayor Krout's conduct is protected by qualified immunity. Plaintiff's claim under 42 U.S.C. 1983 is dismissed.

C. Harassment

Plaintiff next asserts a claim against Mayor Krout for harassment. In support of this claim, Plaintiff relies upon Minnesota Statute section 609.749, which makes it a criminal offense to directly or indirectly manifest a purpose or intent to injure the rights of another by the commission of an unlawful act. Section 609.749 is a pure criminal statute that does not give rise to a private cause of action. *Summers v. R&D Agency, Inc.*, 593 N.W.2d 241, 245 (Minn. App. 1999) (holding that "[b]ecause the legislature neither expressly nor implicitly provided for a civil cause of action or civil remedies in Minn. Stat. § 609.749, we conclude the district court

correctly dismissed appellants' claim"). Therefore, Plaintiff's cause of action for harassment is dismissed.

C. Minnesota Government Data Practices Act

Plaintiff asserts a claim for violation of the Minnesota Government Data Practices Act. Plaintiff offers no argument or explanation as to the basis of this claim, but it appears to be premised upon the City's release of publically-available minutes of the Private Detective and Protective Agent Services Board. Under the Data Practices Act, all government data is publicly accessible unless otherwise classified as private or confidential. Minn. Stat. § 13.01 subd. 3. Plaintiff has failed to cite any provision of the Data Practices Act or any other legal authority to indicate that the minutes of a public meeting are classified as private data. Therefore, Plaintiff's claim under the Data Practices Act is dismissed.

D. Intentional Infliction of Emotional Distress

To sustain a claim for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendants' conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) the conduct caused emotional distress; and (4) the distress was severe. *Leaon v. Washington County*, 397 N.W.2d 867, 873 (Minn. 1983). For conduct to be extreme and outrageous, it must be "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428, 439 (Minn. 1983) (quoting *Haagenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648, 652 n.3 (Minn. 1979)). In analyzing whether conduct is sufficiently outrageous to be actionable under an emotional distress theory, courts must recognize that "this tort is sharply limited to cases involving particularly egregious facts." *Id.* Additionally, the emotional distress must be "so severe that no reasonable man could be

expected to endure it." *Hubbard*, 330 N.W.2d at 439 (citing Restatement (Second) of Torts § 46 comment j (1965)).

As a matter of law, none of Mayor Krout's alleged misdeeds are "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *See Hubbard*, 330 N.W.2d at 439. Most of the statements made by Mayor Krout are similar to those heard in everyday political discourse. Krout expressed her opinion regarding the appropriateness of Plaintiff serving as Charter Commission Chairperson, and she provided factual information concerning Plaintiff's legal troubles. As a matter of law, Krout's statements cannot be construed as "utterly intolerable."

Plaintiff also cannot show emotional distress that is so severe no reasonable person could be expected to endure it. The complaint alleges emotional distress based upon the fact that "Krout made repeated allegations that plaintiff is 'the most unfit person' and should be removed from the Charter Commission." (Compl. ¶ 104.) Being called "unfit" by a political opponent would not cause a reasonable person to suffer severe emotional distress. If such statements gave rise to extreme emotional distress, the world would be awash with emotionally distressed public officials. Plaintiff offers no evidence to demonstrate emotional distress, and he has offered no explanation as to how additional discovery would reveal evidence of emotional distress. Because Plaintiff does not allege sufficiently outrageous conduct and has failed to demonstrate emotional distress, his claim for intentional infliction of emotional distress is dismissed.

E. Negligent Infliction of Emotional Distress

To recover for negligent infliction of emotional distress, a party generally must show that he or she: (1) was within a zone of danger of physical impact; (2) reasonably feared for his or her own safety; and (3) suffered severe emotional distress with attendant physical manifestations.

Stead-Bowers v. Langley, 636 N.W.2d 334, 343 (Minn. App. 2001). In cases involving a direct invasion of a litigant's rights, such as claims for defamation or other willful conduct, a plaintiff may recovery under a negligent infliction of emotional distress theory if he or she suffers severe emotional distress with attendant physical manifestations. *Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902, 907 (Minn. App. 1987) (citing *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 122 N.W.2d 36, 41 (Minn. 1963)). As previously discussed, Plaintiff cannot show a direct invasion of his rights, and he has made no showing of severe emotional distress with attendant physical manifestations. Therefore, Plaintiff's cause of action for negligent infliction of emotional distress is dismissed.

F. Malfeasance & Violation of Oath of Office

Plaintiff asserts causes of action for "malfeasance" and "violation of oath of office." Neither of these claims is recognized as a cause of action, and Plaintiff offers no argument as to how they relate to any established theories of recovery. Therefore, Plaintiff's claims for malfeasance and violation of oath of office are dismissed.

G. Punitive Damages

Plaintiff's cause of action for "punitive damages" must also be dismissed. Punitive damages are a theory of recovery, rather than an independent cause of action. Additionally, Minnesota Statute section 549.191 provides that "the complaint must not seek punitive damages[,]" but "[a]fter filing the suit a party may make a motion to amend the pleadings to claim punitive damages." Plaintiff alleged punitive damages in his initial complaint and he has made no motion to amend. Even if Plaintiff had complied with the procedural requirements of section 549.191, he nevertheless has made no showing regarding entitlement to punitive damages. Even giving Plaintiff the benefit of all reasonable inferences, the alleged conduct in

this case does not show a deliberate disregard for the rights or safety of others. Therefore, Plaintiff's cause of action for punitive damages is dismissed.

III. CONCLUSION

For the reasons cited above, Defendants' motion for summary judgment is granted. This matter is dismissed with prejudice.

RMC